



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

Integrating Union citizenship and the charter of Fundamental Rights

Citation for published version:

Nic Shuibhne, N 2017, Integrating Union citizenship and the charter of Fundamental Rights. in D Thym (ed.), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU*. Modern Studies in European Law, Hart Publishing, pp. 209-239.

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

Questioning EU Citizenship

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.



Integrating Union citizenship and the Charter of Fundamental Rights

Niamh Nic Shuibhne *

* School of Law, University of Edinburgh.

This work was partly funded by a Leverhulme Trust Major Research Fellowship. Sincere thanks to Daniel Thym for valued comments on an earlier draft.

I. Introduction

Fundamental rights and Union citizenship are both, on their own terms, essential elements of the European Union's constitutional profile. In a legal sense, they also combine in three main ways. First, the opening words of Directive 2004/38/EC assert that '[c]itizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States'.¹ The fundamental nature of that right is underlined by its restatement in Article 45(1) of the Charter. Second, beyond the right to move and reside, wider fundamental rights questions can arise *when* a Union citizen moves and resides. For example, the right to respect for family life had shaped the outcome of citizenship case law even before the Charter acquired binding effect.² This second interaction accounts for the most typical assessment of fundamental rights in conjunction with citizenship rights, and sustains an enduring legacy for the vision outlined by Advocate General Jacobs in *Konstadinidis*.³ Third, in exceptional circumstances, Union citizenship can also be engaged when there is no movement from the citizen's home State at all⁴ and can therefore, in turn, engage Union standards on the protection of fundamental rights.⁵

But rights can be legitimately limited too. The general rule is that rights should be interpreted broadly and derogations from or exceptions to them construed

¹ Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L158/77, recital 1.

² E.g. Case C-127/08 *Metock*, EU:C:2008:449; building on Case C-60/00 *Carpenter*, EU:C:2002:434 (freedom to provide services). Exploring these links soon after Maastricht, see S O'Leary 'The relationship between Community citizenship and the protection of fundamental rights in Community law' (1995) 32 *Common Market Law Review* 519.

³ Writing before Maastricht, AG Jacobs proposed that 'a Community national who goes to another Member State as a worker or self-employed...is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host State; he is in addition entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say "civis europeus sum" and to invoke that status in order to oppose any violation of his fundamental rights' (AG Jacobs in Case C-168/91, EU:C:1992:504, para. 46 of the Opinion).

⁴ E.g. Case C-135/08 *Rottmann*, EU:C:2010:104; Case C-34/09 *Ruiz Zambrano*, EU:C:2011:124.

⁵ E.g. Joined Cases C-356/11 and C-357/11 *O and S*, EU:C:2012:776, paras 58-59.

narrowly.⁶ The right to move and reside is qualified at a general level by the statement that it is conferred 'subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect' (Article 21(1) TFEU).⁷ Directive 2004/38 is the main 'measure' in that respect. For fundamental rights, Articles 50-54 of the Charter are the 'general provisions' that govern its 'interpretation and application'. Article 51(1) states that the Charter is 'addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States *only when they are implementing Union law*'. Article 51(2) emphasises that the Charter 'does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties'. Article 52(1) outlines four basic criteria for establishing that limitations on Charter rights are legitimate.⁸ And Article 52(2) provides that '[r]ights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties'.

Determining the scope of citizenship and fundamental rights therefore requires that both realising rights and recognising appropriate limitations must be carefully accommodated in accordance with the framework rules set down in the Treaty and in the Charter. Reflecting the significance of judicial interpretation for that task, this chapter investigates how the Court of Justice has undertaken it since the Charter became legally binding.⁹ To frame the analysis of relevant case law, the chapter examines the interplay between rights and limits in two key ways: first, how the provisions that limit the scope of the Charter apply in citizenship law; and, second, how limits on citizenship rights are measured for compliance with Charter rights. The judgments presented are analysed with respect to both internal consistency - i.e. assessing how case law on citizenship rights and Charter rights is developing in each respective sphere - and systemic consistency - i.e. assessing whether case law on citizenship rights and Charter rights fits together..

Following a brief overview of how Articles 51 and 52 of the Charter are interpreted in a general sense (section II), the chapter then traces how both provisions are applied in citizenship case law. Two main problems are identified. First, the determination that certain citizenship cases fall outside the scope of the Charter for

⁶ E.g. Joined Cases C-482 & 493/01 *Orfanopoulos and Oliveri*, EU:C:2004:262 paras 64-65.

⁷ See similarly, Article 20(2) TFEU: 'Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties... These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder'.

⁸ It provides: '[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'.

⁹ Article 6(1) TEU, as amended by the Lisbon Treaty, provides: '[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties'.

the purposes of Article 51 is difficult to predict or rationalise and apparently out of sync with how the scope of the Charter is determined more generally (sections III(A) and III(B) respectively). Second, the relationship between primary law and secondary law, already complicated because of Article 21(1) TFEU, is even more difficult to systematize when we also consider Article 52 of the Charter (section IV).

At one level, both problems fit with the generally restrictive trends evident in recent citizenship case law, where we see stronger endorsement of Member State interests and concerns; adjustment of the threshold at which proportionality analysis becomes necessary, by accounting for the (potential) systemic implications of free movement over evaluation of individual case circumstances; and a sharpening of citizenship's access conditions i.e. the criteria connecting situations to the equal treatment promised by the Treaty.¹⁰ However, counter-intuitively against the developments just outlined, it will also be seen that fundamental rights clout is materialising in other parts of citizenship case law, where the right to move has either not been exercised at all or appraisal of the conditions under which it has been exercised is overlooked. The fragmented case law picture that results renews questions about what kind of affiliation this complicated and unpredictable status of Union citizenship is turning out to be.¹¹ Conversely, how fundamental rights are treated in citizenship cases has implications for how the system of Charter law proceeds also.

The chapter argues overall that Union citizenship and fundamental rights protection should be *integrated* more consistently and more effectively. This statement exhibits both a normative claim and a concrete objective, reflecting the centrality of both citizenship and fundamental rights protection to the Union's claims to constitutionalism – and indeed to constitutional credibility. The Charter is not a standalone instrument for all-inclusive fundamental rights protection. That is neither its purpose nor its goal. But the exercise of Union citizenship rights provides the necessary trigger for the required integrated approach. The conferring of legal effect on the Charter through the Lisbon Treaty was just one innovation among many in that reform process, in respect of which '[t]he main intended beneficiaries...were neither the Member States nor the institutions, but individuals'.¹² In citizenship case law, fundamental rights are treated too erratically. It is not yet sufficiently clear either *when* the Charter will apply or *what* its guarantees might then mean in substance. Article 2 TEU tells us that the Union is 'founded' on respect for human rights. In particular, therefore, when it is decided that Union standards of fundamental rights protection do not apply, the criteria used to make that determination need to be explicit, objective and methodically applied. Both citizenship and fundamental rights protection ask at least this.

¹⁰ These issues are discussed comprehensively in several contributions to this volume; see esp. the chapters by U Šadl and F Wollenschläger.

¹¹ See e.g. recently, C O'Brien 'Civis capitalist sum: class as the new guiding principle of EU free movement rights' (2016) 53 *Common Market Law Review* 937.

¹² D Sarmiento and E Sharpston 'European citizenship and its new Union: time to move on?' in D Kochenov (ed) *The Role of EU Citizenship Rights in EU Federalism: Ambiguity and Change* (Cambridge, CUP, forthcoming 2017).

II. Articles 51 and 52 of the Charter: the basic framework

In essence, Articles 51 and 52 govern, respectively, when Charter rights are relevant and when limits placed on them are legitimate. It is not surprising that the Court was asked questions about both provisions soon after they acquired binding legal effect.

A. Article 51 and the reach of Charter rights

A crucial aspect of Article 51 concerns when Member States are ‘implementing’ Union law since it is there made clear that the Charter is (only) then addressed to them. The Explanations relating to the Charter¹³ – to which the Court is required by Article 6(1) TEU to have ‘due regard’ – assert that it ‘follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act *in the scope of Union law*’.¹⁴ In *Åkerberg Fransson*, the Court confirmed that position.¹⁵ The idea of Member States acting ‘in the scope’ of Union law suggests a broad conception of Article 51.¹⁶ Conversely, the limits of the term are not self-evident.¹⁷ For example: the Charter applies to ‘all situations governed by European Union law’¹⁸ and it does not apply when national legislation ‘falls outside the framework of EU law’.¹⁹ But how might these situations actually be distinguished?

In *Julian Hernández*, the Court elaborated: ‘the concept of “implementing Union law”...presupposes *a degree of connection* between the measure of EU law and the national measure at issue which *goes beyond the matters covered being closely related* or one of those matters having an *indirect impact* on the other’.²⁰ Therefore, it is necessary to determine: ‘whether the national legislation *is intended to implement* a provision of EU law; the *nature* of the legislation at issue and *whether it pursues objectives other than those covered by EU law*, even if it is capable of indirectly affecting

¹³ 2007 OJ C303/2.

¹⁴ Emphasis added; citing Case 5/88 *Wachauf*, EU:C:1989:321; Case C-260/89 *ERT*, EU:C:1991:254; and Case C-309/96 *Annibaldi*, EU:C:1997:631, which evidences an aim to ensure continuity between the pre-Lisbon and post-Lisbon approach.

¹⁵ Case C-617/10 *Åkerberg Fransson*, EU:C:2013:105, para. 19: ‘[The Court] has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensure’. In para. 20, the Court refers to the Explanations on this point.

¹⁶ For discussion, see E Hancox ‘The meaning of “implementing” EU law under Article 51(1) of the Charter: *Åkerberg Fransson*’ (2013) 50 *Common Market Law Review* 1411.

¹⁷ For extensive analysis, see M Dougan ‘Judicial review of Member State action under the general principles and the Charter: defining the “scope of Union Law”’ (2015) 52 *Common Market Law Review* 1201.

¹⁸ Case C-45/12 *Hadj Ahmed*, EU:C:2013:390, para. 56.

¹⁹ Case C-418/11 *Texdata Software*, EU:C:2013:588, para. 72.

²⁰ Case C-198/13 *Julian Hernández*, EU:C:2014:2055, para. 34 (emphasis added).

EU law; and also whether there are *specific rules of EU law* on the matter or rules which are *capable of affecting it*.²¹ Here, the criteria were expressed cumulatively but in *Siragusa*, the phrasing changed to ‘*some of the points to be determined are whether that legislation is intended to implement a provision of EU law*’ etc.²² In the next paragraph, the Court noted: ‘[i]n particular, the Court has found that fundamental EU rights could not be applied in relation to national legislation because the provisions of EU law in the subject area concerned did not impose any obligation on Member States with regard to the situation at issue in the main proceedings’.²³ The Court therefore seeks more than ‘an overlap or coincidence of subject matter’²⁴ to find that a Member State is implementing Union law. But pinning down the necessary ‘degree of connection’ remains, perhaps inevitably, open to interpretation.

B. Article 52 and the nature of limits

It was noted at the outset of this chapter that an EU citizen’s right to move and reside freely is expressed in the Treaty (in Articles 20(2) and 21(1) TFEU) but also in Article 45(1) of the Charter. When assessing restrictions on the relevant Treaty rights, the Court has applied the justification framework developed for free movement law generally i.e. the restriction ‘must be appropriate for securing the attainment of a legitimate objective and must not go beyond what is necessary to attain that objective’.²⁵ Article 52(1) of the Charter encompasses these criteria, but it adds that any limitation on Charter rights ‘must be provided for by law and respect the essence of those rights and freedoms’ and includes ‘the need to protect the rights and freedoms of others’ alongside its recognition of limitations that protect ‘objectives of general interest recognised by the Union’. Consequently, in *ZZ*, the Court alluded to the added weight of scrutiny that Article 52(1) seems to require.²⁶

However, Article 52(2) then provides that ‘[r]ights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties’ – bringing us back for citizenship law to Article 21(1) TFEU and remembering, in particular, the instruction clearly spelled out there that the right to move and reside freely may be limited by secondary legislation as well as by provisions elsewhere in the Treaties. In *Pfleger*, concerning a restriction on the free provision of services and building on the approach summarised in Section II(A) above, the Court first confirmed a significant point of continuity with pre-Charter case law i.e. aiming to derogate from or restrict free movement rights

²¹ *Julian Hernández*, para. 37 (emphasis added). The final criterion appears in slightly altered expression in e.g. Case C-265/13 *Torralbo Marcos*, EU:C:2014:187, para. 32: ‘European Union law does not contain any specific rules in that area or any which are *likely to affect* that national legislation’ (emphasis added).

²² Case C-206/13 *Siragusa*, EU:C:2014:126, para. 25 (emphasis added).

²³ *Siragusa*, para. 26 (emphasis added).

²⁴ *Dougan*, n17 above, esp. 1221-1228.

²⁵ Case C-20/12 *Giersch*, EU:C:2013:411, para. 46.

²⁶ Case C-300/11 *ZZ*, EU:C:2013:363, para. 51

constitutes ‘implementing’ Union law for the purposes of Article 51 of the Charter.²⁷ But it then suggested an absorptive effect for Article 52(2), concluding that ‘an unjustified or disproportionate restriction of the freedom to provide services under Article 56 TFEU is also not permitted under Article 52(1) of the Charter in relation to Articles 15 to 17 of the Charter’.²⁸ In other words, ‘*in the present case*, an examination of the restriction represented by the national legislation at issue in the main proceedings from the point of view of Article 56 TFEU *covers also* possible limitations of the exercise of the rights and freedoms provided for in Articles 15 to 17 of the Charter, so that a separate examination is not necessary’.²⁹

In one sense, the approach taken in *Pfleger* was uncontroversial because a restriction of rights was established under Article 56 TFEU. However, had the national measure been excused, would its examination under the additional criteria in Article 52(1) then be redundant? It would seem so. For example, in *ONEm*, the Court ruled that since the contested EU legislation ‘complies with Article 45 TFEU and Article 48 TFEU, *it also complies with* Article 15(2) of the Charter’.³⁰ In support, the Court cited its previous finding in *Gardella* that Article 52(2) ‘provides that rights recognised by the Charter for which provision is made in the treaties are to be exercised under the conditions and within the limits defined therein. In that vein, Article 15(2) of the Charter reiterates *inter alia* the free movement of workers guaranteed by Article 45 TFEU, as confirmed by the explanations relating to that provision’.³¹

Interestingly, the Explanations outline that Article 51(2):

... refers to rights which were already expressly guaranteed in the [EC Treaty] and have been recognised in the Charter, and which are now found in the Treaties (*notably the rights derived from Union citizenship*). It clarifies that such rights remain subject to the conditions and limits applicable to the Union law on which they are based, and for which provision is made in the Treaties. The Charter does not alter the system of rights conferred by the EC Treaty and taken over by the Treaties’ (emphasis added).

This text indicates a protective purpose for Article 51(2). But if its application removes aspects of citizenship law from autonomous Charter review, then what seems initially like an absorptive effect might be more accurately described as an exclusionary one. But then, while Article 6(1) TEU sets the Treaties and the Charter at the same legal level, the particular construction of Articles 20 and 21 TFEU could signal a secondary law route out of both. That would in turn render the first statement confirmed in *Pfleger* – that derogating from or justifying restrictions on free movement rights does constitute implementing EU law – all the more important to

²⁷ Case C-390/12 *Pfleger*, EU:C:2014:281, para. 35.

²⁸ *Pfleger*, para. 59, referring to paras 63-70 of the Opinion of AG Sharpston (EU:C: 2013: 747).

²⁹ *Pfleger*, para. 60 (emphasis added).

³⁰ Case C-284/15 *ONEm*, EU:C:2016:220, para. 34 (emphasis added).

³¹ Case C-233/12 *Gardella*, EU:C:2013:449, para. 39.

ensure compliance with EU fundamental rights standards. After all, one function of fundamental rights is to construct boundaries around the choices of the legislator.

III. Citizenship and Article 51: delimiting the scope of the Charter through the condition of implementing Union law

This section assesses the extent to which application of the Charter in citizenship case law aligns with the framework rules on Article 51 outlined in section II(A) above i.e. the Charter should apply when there is a sufficient ‘degree of connection’ between EU law and national law that ‘goes beyond the matters covered being closely related or one of those matters having an indirect impact on the other’. That threshold ought to be reached when Member State activity is connected to derogation from or justification of restrictions on free movement rights, as examined in section III(A). In section III(B), the discussion considers situations in which EU fundamental rights standards apply even though the right to move and reside has not been exercised.

A. To move: Article 21 TFEU

Since the Lisbon Treaty came into force, national courts and tribunals habitually frame questions about the interpretation of EU citizenship rights by reference to Charter provisions.³² These preliminary ruling requests raise interesting questions about what Charter rights mean in substance. For example, in *ZZ*, the Court provided detailed guidance on the right to effective judicial protection and the rights of the defence, triggered by a requested interpretation of Article 30 of Directive 2004/38. Similarly, as might be expected, cases about respect for private and family life (Article 7 of the Charter) continue to be referred.³³ Through this case law, the guarantees articulated in the Charter acquire meaning and substance. At one level, national disputes on the right to move and reside should be straightforward for the purposes of Article 51 of the Charter, since EU legislation – principally (but, as will be seen below, not exclusively) Directive 2004/38 – is normally engaged. However, the imprint of the Charter on this line of case law is fainter than might be anticipated. Three points of concern can be suggested: framing, silence, and consistency.

First, how the Court of Justice frames the dispute before it can make a critical difference for the applicability of the Charter. For example, in *Iida*, the case concerned whether the applicant – the Japanese father of a German child, the latter now residing in Austria with her mother – could derive a right to (continue to) reside in Germany from his daughter’s status as a Union citizen. In its judgment, the Court focused on any connection that might be established between the *applicant* and Union law, finding no such connection and therefore ruling that ‘the German authorities’

³² See e.g. the list of Charter-framed questions in para. 32 of Case C-40/11 *Iida*, EU:C:2012:691; for a pending case, see e.g. Case C-366/16 *H*.

³³ See e.g. Case C-145/09 *Tsakouridis*, EU:C:2010:708, para. 52 (justification of national measures restricting free movement); Case C-208/09 *Sayn-Wittgenstein*, EU:C:2010:806, para. 52 (names as a constituent element of identity and private life).

refusal to grant Mr Iida a “residence card of a family member of a Union citizen” does not fall within the implementation of European Union law within the meaning of Article 51 of the Charter, so that its conformity with fundamental rights cannot be examined by reference to the rights established by the Charter’.³⁴ But concentrating the analysis on the third country national family member in this way, as the bearer only of derived rights,³⁵ is unusual in free movement law. In contrast, Advocate General Trstenjak had followed the conventional approach, examining the question from the perspective of a potential restriction on the free movement rights of the Union citizen i.e. Mr Iida’s daughter, and finding in consequence that an assessment of the national decision did have to be undertaken, as a potential restriction of those rights, to check for compliance with Article 7 of the Charter.³⁶

Second, the circumstances of some cases seem inescapably connected to fundamental rights, yet there is an odd ‘Charter silence’ on this in the judgment of the Court. The decision in *Ruiz Zambrano* is a classic example and will be discussed in section III(B) below. But we can find instances of the same silence in case law on the exercise of free movement rights. For example, in *Singh*, concerning the scope of rights retained by a third country national in a host State following his divorce from a Union citizen who had left that State, the Court applied a (disputable) interpretation of Article 13(2) of Directive 2004/38 without any consideration of how the protection of fundamental rights might affect it.³⁷ Subsequently, in *NA*, where the Court was asked once again to interpret Article 13(2) of the Directive – and here in a case that involved domestic violence – there is again no reference to the Charter or to fundamental rights more generally. Adopting a ‘literal, systematic and teleological interpretation’ of Article 13(2), the Court concluded that ‘when [Directive 2004/38] was adopted, the EU legislature declined to make provision, in the event of the departure from the host Member State of the Union citizen, for specific safeguards that would be available, on account of, inter alia, particularly difficult situations, to his family members who do not have the nationality of a Member State, that would be comparable to those provided for in Article 13(2)(c) of Directive 2004/3’.³⁸ Advocate General Wathelet applied the same interpretative method i.e. examining the context

³⁴ *Iida*, para. 81; see generally, paras 73ff.

³⁵ E.g. Case C-87/12 *Ymeraga and Others*, EU:C:2013:291, para. 35: ‘Any rights conferred on third-country nationals by the Treaty provisions on Union citizenship are not autonomous rights of those nationals but rights derived from the exercise of freedom of movement by a Union citizen’.

³⁶ AG Trstenjak in *Iida* (EU:C:2012:296), esp. paras 72-87 of the Opinion.

³⁷ Case C-218/14 *Singh*, EU:C:2015:476; for critique, see F Strumia ‘Divorce immediately, or leave. Rights of third country nationals and family protection in the context of EU citizens’ free movement: *Kuldip Singh and Others*’ (2016) 53 *Common Market Law Review* 1373 esp. 1387-1388. Drawing softer and harder implications from the judgment, see respectively the Opinion of AG Wathelet (EU:C:2016:259) and judgment of the Court (EU:C:2016:487) in Case C-115/15 *NA*, discussed further below.

³⁸ *NA*, paras 49 and 44 respectively.

and objectives of Article 13(2), and the intention of the legislator through discussion of the measure's drafting history. But he reached the opposite conclusion.³⁹

What the Court did not consider in *NA* is whether the EU legislature 'declining' to make such provision is itself Charter-compliant.⁴⁰ Neither did the Court draw from previous case law in which the implications of legislation-compliant national decisions were nevertheless checked against the general principles of EU law.⁴¹ Legislation being treated as the beginning and the end of the matter bridges then to the third point of concern: even where the Court does engage with the applicability of the Charter more overtly, case law indicates problematic inconsistency with both the *Åkerberg Fransson* / *Julian Hernández* framework outlined in section II(A) and the premise established in section II(B) that derogation/justification *itself* constitutes implementation of EU law and thus triggers consideration of the Charter.

The judgment in *Dano* exemplifies this point for rights exercised under Article 21 TFEU. In this case, there is undeniable cross-border movement – a Romanian national moved to and resided in Germany. The Court first recited its standard approach to cross-border situations, stating that '[e]very Union citizen may...rely on the prohibition of discrimination on grounds of nationality laid down in Article 18 TFEU in all situations falling within the scope *ratione materiae* of EU law. These situations include those relating to the exercise of the right to move and reside within the territory of the Member States conferred by...Article 20(2) TFEU and Article 21 TFEU'.⁴² However, as presented in more detail in other contributions to this volume, the Court then found that the applicant's eligibility for social assistance in the host State could not fall within the scope of Article 21(1) of Directive 2004/38 – which it examined as a 'more specific expression' of the principle of non-discrimination – since she did not reside lawfully in Germany; moreover, the conditions for lawful residence were linked exclusively to Article 7(1) of the Directive in the circumstances of the case.⁴³ By dispensing with consideration of Ms Dano's Treaty rights through this method, the Court also dispensed with the need for classic public interest justification and proportionality analysis.

The referring court had also asked 'whether Articles 1 [human dignity], 20 [equality before the law] and 51 of the Charter [require] the Member States to grant Union citizens non-contributory cash benefits by way of basic provision such as to enable permanent residence or whether those States may limit their grant to the provision of

³⁹ AG Wathelet in *NA*, paras 60ff of the Opinion; explicitly addressing the context of domestic violence, he concluded that 'requiring a third country national to show that her ex-spouse was exercising Treaty rights in the host Member State at the time of the divorce in order to be able to retain a right of residence would therefore be manifestly contrary to the objective of legal protection pursued by that provision' (para. 73 of the Opinion).

⁴⁰ It did, however, establish a derived right of residence for the applicant on the basis of what is now Article 10 of Regulation 492/2011; see paras 53-67.

⁴¹ E.g. Case C-413/99 *Baumbast*, EU:C:2002:49.

⁴² Case C-333/13 *Dano*, EU:C:2014:2358.

⁴³ *Dano*, paras 68-76.

funds necessary for return to the home State'.⁴⁴ This question connects to the fact that the benefits at issue fell within the scope of both Directive 2004/38 as social assistance and Article 70 of Regulation 883/2004 as non-contributory cash benefits.⁴⁵ On this question, the Court responded:

[Regulation 883/2004] is not intended to lay down the conditions creating the right to those benefits. It is thus for the legislature of each Member State to lay down those conditions. Accordingly, since those conditions result neither from Regulation No 883/2004 nor from Directive 2004/38 or other secondary EU legislation, and the Member States thus have competence to determine the conditions for the grant of such benefits, they also have competence...to define the extent of the social cover provided by that type of benefit. Consequently, when the Member States lay down the conditions for the grant of special non-contributory cash benefits and the extent of such benefits, they are not implementing EU law.⁴⁶

The Court further recalled that 'the Charter, pursuant to Article 51(2) thereof, does not extend the field of application of EU law beyond the powers of the European Union or establish any new power or task for [it] or modify powers and tasks as defined in the Treaties' and reiterated the limitation built into Article 51(1).⁴⁷

It is difficult to conceive how national rules that determine the level of social assistance to which EU citizens are entitled falls outside the scope of EU law. Through its analysis, the Court closed down two different lines of case law that would result in the *Dano* circumstances establishing the necessary 'degree of connection' required by Article 51 for triggering the applicability of the Charter. First, on the nature of Regulation 883/2004, Dougan draws an analogy with the contrasting approach taken to age discrimination in *Kücükdeveci*, 'the logic of which should have led the Court to affirm the applicability of the Charter in *Dano*: regardless of whether or not the detailed conditions for and extent of special non-contributory cash benefits are defined by Union law, such benefits are nevertheless certainly defined and regulated by Regulation 883/2004'.⁴⁸ Similarly, the Directive at issue in *Åkerberg Fransson* empowered States to apply sanctions for VAT offences; but it did not itself lay down the penalties that must be applied in such situations.⁴⁹ As

⁴⁴ *Dano*, para. 85.

⁴⁵ Regulation 883/2004 on the coordination of social security systems, 2004 OJ L166/1; see further, *Dano*, esp. paras 46-55 and 63.

⁴⁶ *Dano*, paras 89-91.

⁴⁷ *Dano*, paras 87-88. The Court's depiction of what the Regulation does *not* preclude vis-à-vis the Directive has implications beyond the applicability of the Charter: see Case C-308/14 *Commission v UK*, EU:C:2016:436; for discussion, see C O'Brien 'The ECJ sacrifices EU citizenship in vain: *Commission v UK*' (2017) 54 *Common Market Law Review* 209.

⁴⁸ Dougan, n17 above, 1225; Case C-555/07 *Kücükdeveci*, EU:C:2010:21.

⁴⁹ Council Directive 2006/112/EC on the common system of value added tax, 2006 OJ L347/1.

expressed in a general sense by Sarmiento, 'it is not the *intention* of the State, but the *function* of the State act regarding the implementation of EU law which matters'.⁵⁰

Second, as already alluded to above, by pushing the dispute exclusively through secondary law premises, the Court sidesteps the need for analysis that probes restrictions on primary rights and corresponding arguments about justification on grounds of public interest, which is normally undertaken where Article 21 TFEU is engaged.⁵¹ Here, a national of one Member State had moved to and resided in another Member State. That fact sparks an unambiguous cross-border connection. Examining the restriction placed on her free movement rights in light of fundamental rights committed to in the Charter could have applied, in the first instance, to the legislative choices expressed in Directive 2004/38 itself. In other words, what the Court does not address here is that the Directive implements Article 21 rights. Moreover, the national court's question was not framed around the Regulation – it was framed around the benefit. And the Court had itself insisted that the benefit in question fell within the scope of the Directive as well as of the Regulation.

Alternatively, the Court could have applied the Charter to an assessment of the contested national rules, especially since it provided an implicit indication of the relevant public interest underpinning those rules in the statement that the objective of Article 7 of the Directive is 'to prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence'.⁵² On this point, there is also, once again, a missed linkage between the concern in *Dano* to equip the Member States to address possible abuse of free movement rights and the objective of 'preventing [VAT] evasion' applied in *Åkerberg Fransson*.⁵³ Additionally, Directive 2004/38 signals other objectives too: ensuring, for example, that the right to move and reside freely is 'to be exercised under objective conditions of freedom and dignity' (recital 5) and that the Directive in its entirety 'respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union' (recital 31).

In contrast, drawing from the terminology outlined in section II(A), the Court seems to be saying in *Dano* that where the conditions for lawful residence set down in the Directive are not met, there is never a *sufficient degree of connection* between national measures that exclude EU citizens from eligibility to social assistance and EU law; there are no *specific rules of EU law* on the matter or rules *capable of or likely to affect* it; the subject area concerned *does not impose any obligations* on the Member States. In

⁵⁰ D Sarmiento 'Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe' (2013) 50 *Common Market Law Review* 1267, 1279 (emphasis in original).

⁵¹ Cf. e.g. Case C-503/09 *Stewart*, EU:C:2011:500, para. 81: 'Situations falling within the material scope of EU law include those involving the exercise of the fundamental freedoms guaranteed by the Treaties, in particular those involving the freedom to move and reside...as conferred by Article 21 TFEU'.

⁵² *Dano*, para. 76; confirmed in Case C-67/14 *Alimanovic*, EU:C:2015: 597, para. 50.

⁵³ *Åkerberg Fransson*, para. 25; *Dano*, paras 76-78.

Commission v UK, which builds on the reasoning applied in *Dano*, justification analysis of national measures that result in discrimination against EU citizens was restored.⁵⁴ The more recent judgment pierces even further into equal treatment rights through its finding that attaching a lawful residence condition to eligibility for non-contributory social benefits – i.e. *not* social assistance – before EU citizens may claim them is justified by ‘the need to protect the finances of the host Member State’.⁵⁵ And here, once again, there is no discussion of fundamental rights or the Charter at all.

How might the *outcome* in *Dano* have ended up differently? It is first important to acknowledge that application of the Charter might not have altered the substantive outcome at all. However, consideration of the relevant provisions would have provided guidance for national courts faced with similar questions. Moreover, engagement with the Charter for legislation on the rights of third country nationals demonstrates some potential for substantive implications even in the controversial area of social rights.⁵⁶ For example, national authorities are bound by the Charter ‘when determining the social security, social assistance and social protection measures defined by their national law’ in connection with Directive 2003/109.⁵⁷

How might the *approach* taken in *Dano* have ended up differently? In striking contrast, to locate a citizenship dilemma squarely within the Charter in *Petruhhin*, what is left out of the discussion is the *Directive* – demonstrating the exasperating inconsistency that has come to define the evolution of EU citizenship law. The applicant in *Petruhhin* is an Estonian national who was arrested in Latvia in September 2014 and placed in provisional custody there in October. Later that month, the Latvian authorities received an extradition request from Russia, which was authorized by the Public Prosecutor in Latvia. Appealing against the decision to extradite him, the applicant raised equal treatment under Articles 18 and 21 TFEU, since Latvian nationals are protected from extradition in similar circumstances. In its judgment, the Court adopts the fact of movement approach absent from *Dano*,⁵⁸ and it cites a judgment delivered before the Directive took effect on that point.⁵⁹ Significantly for present purposes, the Court speaks only on Articles 18 and 21 TFEU

⁵⁴ *Commission v UK*, paras 74-80.

⁵⁵ *Commission v UK*, para. 80.

⁵⁶ See further, the contribution to this volume by K de Vries.

⁵⁷ Case C-571/10 *Kamberaj*, EU:C:2012:233, paras. 79–80, addressing Article 34(3) of the Charter in particular i.e. ‘In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices’. Directive 2003/109 on the status of third-country nationals who are long-term residents, OJ 2004 L16/44.

⁵⁸ Case C-182/15 *Petruhhin*, EU:C:2016:630, para. 30: ‘in order to determine the scope of application of the Treaties within the meaning of Article 18 TFEU, that article must be read in conjunction with the provisions of the FEU Treaty on citizenship of the Union. The situations falling within their scope of application include, therefore, those involving the exercise of the freedom to move and reside within the territory of the Member States, as conferred by Article 21 TFEU’.

⁵⁹ Case C-209/03 *Bidar*, EU:C:2005:169, paras 31-33.

i.e. it never questions whether the applicant meets the conditions for lawful residence under Directive 2004/38 so that he can, in turn, benefit from equal treatment with home State nationals under Article 24(1) of that measure. Instead, it states that the Latvian rules result in nationality discrimination that can only be justified 'where it is based on objective considerations and is proportionate to the legitimate objective of the national provisions'.⁶⁰ It then finds that 'the decision of a Member State to extradite a Union citizen, in a situation such as that of the main proceedings, comes within the scope of Article 18 TFEU and Article 21 TFEU and, therefore, of EU law for the purposes of Article 51(1) of the Charter'.⁶¹

A fact of movement approach also comes through in the Opinion of Advocate General Wathelet. He did observe that 'the Member States have reiterated...the classic position in this type of situation, namely that in order for the FEU Treaty rules on citizenship of the Union to be applicable the facts of the main proceedings must relate to a matter governed by EU law and that it is not sufficient that the citizen of the Union concerned has exercised his freedom of movement'.⁶² But he continued:

[I]t is settled case-law that the situations falling within the scope of EU law include those involving the exercise of the fundamental freedoms guaranteed by the FEU Treaty, in particular those involving the freedom to move and reside within the territory of the Member States, as conferred by Article 21 TFEU...Thus, in matters falling within the competence of the Member States, a relevant link with EU law may consist in the exercise by a national of one Member State of his right to move and reside on the territory of another Member State.⁶³

He then stated that 'Mr Petruhhin, who was arrested in Latvia, made use of his freedom to move and reside in another Member State, guaranteed by Article 21(1) TFEU'.⁶⁴ Interestingly, he also observed that 'in the absence of rules of EU law on the extradition of nationals of the Member States to Russia, the Member States retain the power to adopt such rules and to conclude agreements on such extradition with the Russian Federation'.⁶⁵ An analogy can surely be seen here with the reasoning of the Court in *Dano* as regards the powers that Member States retain notwithstanding Regulation 883/2004. However, in *Petruhhin*, AG Wathelet recalled instead the standard case law principle that 'the Member States are required to exercise that power in a manner consistent with EU law, and in particular with the provisions of the FEU

⁶⁰ *Petruhhin*, para. 34.

⁶¹ *Petruhhin*, para. 52; citing *Åkerberg Fransson*. The Court goes on to provide guidance to the national court in connection with Articles 1, 4 and 19 of the Charter. It is also interesting to note that the Court stayed outside of citizenship rights altogether to develop the substance of the right to vote; see Case C-650/13 *Delvigne*, EU:ECLI:2015:648; here, Article 14(3) TEU provides the trigger for consideration of Articles 39(2) and 49(1) of the Charter.

⁶² AG Wathelet in *Petruhhin* (EU:C:2016:330), para. 38 of the Opinion.

⁶³ AG Wathelet in *Petruhhin*, para. 39 of the Opinion (emphasis added).

⁶⁴ AG Wathelet in *Petruhhin*, para. 40 of the Opinion.

⁶⁵ AG Wathelet in *Petruhhin*, para. 41 of the Opinion.

Treaty on freedom to move and reside on the territory of the Member States, as conferred by Article 21(1) TFEU on every citizen of the Union'.⁶⁶ In its judgment, the Court made a similar point, framed around the duty of sincere cooperation.⁶⁷ On the question of Charter scope, how then can *Petruhhin* be reconciled with *Dano*?

Commenting on *Åkerberg Fransson*,⁶⁸ Sarmiento observes that the Court 'rejects the possibility that Member States might act within the scope of application of EU law but with no duty to respect the Charter. A strict interpretation of Article 51(1) would have confirmed the existence of areas in which EU law would be applicable, but not the Charter'.⁶⁹ In parts of citizenship case law, precisely this disjointed result has materialised. In *Dano*, not even the possibly softer *Melloni* prescription – i.e. 'where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation *where action of the Member States is not entirely determined by European Union law*, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, *provided that* the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised'⁷⁰ – was considered as a possible reflection of Regulation 883/2004's paradigm of coordination. Neither does the judgment in *Dano* explain how precluding recourse to equal treatment in a host State unless the conditions of

⁶⁶ AG Wathelet in *Petruhhin*, para. 42 of the Opinion. In footnote 15, the Advocate General cited extensive supporting case law, reproduced here in full to underline its widespread influence in citizenship law: 'See, in particular, concerning national provisions on compensation for victims of assaults carried out on national territory...*Cowan* (186/87, EU:C:1989:47, paragraph 19); regarding national rules on criminal matters and criminal procedure...*Bickel and Franz* (C-274/96, EU:C:1998:563, paragraph 17); on national rules governing a person's surname...*Garcia Avello* (C-148/02, EU:C:2003:539, paragraph 25), and...*Runevič-Vardyn and Wardyn* (C-391/09, EU:C:2011:291, paragraph 63 and the case-law cited); regarding an enforcement procedure for the recovery of debts...*Pusa* (C-224/02, EU:C:2004:273, point 22); as regards national rules on direct taxation...*Schempp* (C-403/03, EU:C:2005:446, paragraph 19); concerning national rules defining the persons entitled to vote and stand as a candidate in elections to the European Parliament...*Spain v United Kingdom* (C-145/04, EU:C:2006:543, paragraph 78); regarding the definition of the conditions for the acquisition and loss of nationality...*Rottmann* (C-135/08, EU:C:2010:104, paragraphs 39 and 41); as regards the Member States' power to organise their social security schemes...*Reichel-Albert* (C-522/10, EU:C:2012:475, paragraph 38 and the case-law cited), and...*Commission v Austria* (C-75/11, EU:C:2012:605, paragraph 47 and the case-law cited); and, as regards the content of teaching and the organisation of the education systems of the Member States...*Martens* (C-359/13, EU:C:2015:118, paragraph 23 and the case-law cited)'.

⁶⁷ *Petruhhin*, para. 47.

⁶⁸ And, in particular, on the statement in para. 21 that 'the applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter'.

⁶⁹ Sarmiento, n50 above, 1278.

⁷⁰ *Åkerberg Fransson*, para. 29; citing Case C-399/11 *Melloni*, EU:C:2013:107, para. 60 (emphasis added) and Article 53 of the Charter.

Directive 2004/38 are met⁷¹ fits with the commitment in Article 52(1) of the Charter that restrictions must ‘respect the essence of those rights and freedoms’. Limits may not, in other words, go so far as to negate the existence of the right in the first place.

There is also a problematic distinction as regards citizens who reside in a host State on another legal basis – for example, the children of migrant workers who reside on the basis of the right to complete their education under Regulation 492/2011.⁷² These citizens may remain outside certain rights conferred by the Directive, such as the possibility to achieve permanent residence rights if they or their family members do not meet the Directive’s monetary criteria for lawful residence.⁷³ However, since rights based on Regulation 492/2011 stem from Article 45 TFEU, they would still fall within the scope of the Charter. So here, for example, does exclusion of a parent from qualification for permanent residence in a host State, even though he or she was residing lawfully there with Union citizen child(ren) under non-Directive premises of EU law, align with the requirement in Article 24(2) of the Charter that the child’s best interests must be a primary consideration in decisions taken by public authorities? Asking the question in this way would require consideration of what public interest is served by the exclusion and whether it is achieved proportionately. In *Ruiz Zambrano*, AG Sharpston remarked that ‘[i]t would be paradoxical (to say the least) if a citizen of the Union could rely on fundamental rights under EU law when exercising an economic right to free movement as a worker, or when national law comes within the scope of the Treaty (for example, the provisions on equal pay) or when invoking EU secondary legislation (such as the services directive), but could not do so when merely “residing” in that Member State’.⁷⁴ But that paradoxical place is precisely where we seem to have ended up in EU citizenship law.

In *Dano*, Advocate General Wathelet had offered another argument to remove the case from the reach of the Charter. Looking to Article 52(2) – which was described above as generating at least an absorptive and possibly also an exclusionary effect on the evaluation of limits placed on Charter rights – there was, in his view, no need for the Court to deal with equal treatment under Article 20 of the Charter.⁷⁵ In one sense, that reasoning confirms the approach of the Court in *Pfleger* and *ONEm*, outlined in section II(B) above. What becomes clearer by reflecting on it in the light of *Dano* is that Article 52(2) of the Charter would then deprive equal treatment (protected by Article 20 of the Charter) of *any* possible effect in cases connected to Article 21 TFEU. In other words, by folding not just the Charter’s promise of a right to move and reside freely (in Article 45(1)) back into Articles 20 and 21 TFEU, but also the right to equal treatment in Article 20 of the Charter back into the same Treaty provisions,⁷⁶

⁷¹ On this point, see Thym ‘When Union citizens turn into illegal migrants: the *Dano* case’ (2015) 40 *European Law Review* 249, 257–58

⁷² See e.g. Case C-480/08 *Teixeira*, EU:C:2010:83.

⁷³ Case C-592/11 *Alarape and Tijani*, EU:C:2013:290, paras 36-47.

⁷⁴ AG Sharpston in *Ruiz Zambrano* (EU:C:2010:560), para. 84 of the Opinion.

⁷⁵ AG Wathelet in *Dano* (EU:C:2014:341), paras 149-151 of the Opinion.

⁷⁶ At para. 149 of the Opinion, AG Wathelet stated: ‘the principle of equal treatment referred to in Article 20 of the Charter is also laid down in Articles 20 TFEU and 21 TFEU’.

parallel expressions of the right to move and reside become conflated with what we normally think of as ancillary rights i.e. the rights that represent the *conditions* under which the right to move and reside is exercised. Is it not supposed to be precisely the other way around i.e. that the Charter sets parameters for the interpretation of legislation; not that legislation can bypass the requirements of the Charter?

This question is picked up again in section IV below, but it is worth underlining as a preliminary point that even something falling within the scope of Union law per Article 51 will not necessarily engage Charter applicability where Article 52(2) needs to be considered too. For now, we do not know whether the Charter's commitments to human dignity or the combating of social exclusion and poverty have concrete implications for a State's decision, based on a framework set by the EU legislature, not to extend social assistance to Union citizens in certain circumstances. But '[c]itizens deserve to know if the Court is willing to uphold a strong Charter of rights or, on the contrary, whether the Charter is merely destined to enunciate generic and low-level standards for a wide community of twenty-eight Member States. The Member States also deserve to know what threshold of rights protection the Court is willing to attribute to the Charter'.⁷⁷ If the Court wishes to avoid accusations of selective, issue-based or policy-driven application of the Charter – or indeed, recalling *Petruhhin*, of the Directive – a more systematic framework for determining the Charter's applicability should be drawn. In particular, the determinations made in citizenship case law need to align more coherently with case law that develops the framework of Article 51 at a more general level. Application of fundamental rights can make a powerful difference in some cases, but in a system founded on 'the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights' (Article 2 TEU), that power is not of itself a good reason to avoid applying them. It is vital to remember once again that engaging the Charter does not necessarily mean that the outcome of a case will be different. As we saw in section II, Charter rights are not absolute and may legitimately be limited, both by the Union institutions and by the Member States when their authorities act in the scope of EU law. But Article 2 TEU does I think require that how the outcome of a case fits with Union thresholds for and understandings of fundamental rights protection should be clearly articulated, carefully explained, and consistently applied. It requires that the fundamental rights question is addressed, at least. We cannot claim that case law on Article 21 TFEU meets these benchmarks yet. In section III(B), it will be shown that we cannot claim it for case law on Article 20 TFEU either; but it will be seen that the trajectory here is more promising.

B. To stay: Article 20 TFEU

When Union citizens remain in their State of nationality but nevertheless trigger Union citizenship rights under Article 20 TFEU – a line of case law built on *Rottmann* – when does the Charter apply? There is a critical difference between disingenuous appeals to citizenship to attract EU fundamental rights protection in what are, in reality, situations purely internal to one Member State that are not otherwise

⁷⁷ Sarmiento and Sharpston, n12 above.

connected to Union law; and attributing appropriate substance to fundamental rights when EU citizenship is legitimately engaged. In *Ruiz Zambrano*, the Court's silence on the Charter could perhaps be explained by uncertainty about that very dilemma.⁷⁸ It ruled that third country national family members may derive a residence right from static Union citizens in the latter's home State when not granting that derived right would 'have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'.⁷⁹ The fact of dependency between minor Union citizens and their parents suggested to the Court that 'such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents'.⁸⁰ The Court rationalised the granting of a work permit on the same basis. Otherwise, the children's father, in this case, 'would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union'.⁸¹ In *Iida*, the 'intrinsic connection with the freedom of movement of a Union citizen' informing the Court's reasoning and the exceptional nature of the 'very specific situations' to which it applies were underlined.⁸²

The referring court in *Ruiz Zambrano* connected its citizenship questions to Articles 21, 24 and 34 of the Charter,⁸³ but the Court stayed clear of explaining how or to what extent the circumstances of the case constituted the 'implementation' of Union law. Soon afterwards, it addressed the question in *Dereci*. First, considering further when a Union citizen might be forced to leave the Union territory, the Court ruled that 'the mere fact that it might appear desirable to a national of a Member State, for economic reasons *or in order to keep his family together in the territory of the Union*, for the members of his family who do not have the nationality of a Member State to be able

⁷⁸ Other considerations have been suggested to explain this 'Charter silence' – see e.g. S Iglesias Sánchez 'The Court and the Charter: the impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights' (2012) 49 *Common Market Law Review* 1565, 1577 (observing that 'the controversial or adventurous solutions arrived at by the Court could somehow have a negative impact in the attitude of national authorities or private actors towards the Charter').

⁷⁹ *Ruiz Zambrano*, para. 42; capturing the resulting 'crossroads' moment for potential further development of both citizenship and fundamental rights law, see S Iglesias Sánchez 'Fundamental rights and citizenship of the Union at a crossroads: a promising alliance or a dangerous liaison?' (2014) 20 *European Law Journal* 464; and MJ Van den Brink 'EU citizenship and EU fundamental rights: taking EU citizenship rights seriously?' (2012) 39 *Legal Issues of Economic Integration* 273.

⁸⁰ *Ruiz Zambrano*, para. 44.

⁸¹ *Ibid.*

⁸² *Iida*, paras 72 and 71 respectively; for analysis, see S Reynolds 'Exploring the "intrinsic connection" between free movement and the genuine enjoyment test: reflections on EU citizenship after *Iida*' (2013) 38 *European Law Review* 376.

⁸³ *Ruiz Zambrano*, para. 35; raising the non-discrimination, rights of the child, and social security and social assistance provisions of the Charter respectively.

to reside with him in the territory of the Union, *is not sufficient in itself* to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted'.⁸⁴ But, second, the Court suggested that this was 'without prejudice to the question whether, on the basis of other criteria, inter alia, by virtue of the right to the protection of family life, a right of residence cannot be refused'.⁸⁵

Considering the rights protected under Article 7 of the Charter to be 'the same' in meaning and scope as the rights protected under Article 8 ECHR,⁸⁶ but also recalling Article 51(1) of the Charter, the Court advised that 'if the referring court considers...that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR'.⁸⁷ What that circular statement does not address is the stage at which, in the determination of a *Ruiz Zambrano* residence right, EU standards of fundamental rights become relevant for national authorities. Moreover, in *Ruiz Zambrano*, both parents were third country nationals, but from *Dereci* onwards we see the variation that dependent Union citizens were connected to at least one carer himself or herself possessing Union citizenship: could such situations ever reach the threshold of forced departure from the Union territory? And how might that be determined in connection with the protections provided by the Charter, Article 24(2) of which provides that '[i]n all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration'? Additionally, Article 24(3) establishes that '[e]very child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests'.

Citizenship case law has started to answer some of these critical questions. In *CS*, the Court ruled that the Charter is relevant when a Member State seeks to deport a third country national family member who resides there with a dependant Union citizen on the basis of *Ruiz Zambrano* but has been convicted of a criminal offence: 'since [the applicant's] situation falls within the scope of EU law, assessment of her situation must take account of the right to respect for private and family life, as laid down in Article 7 of the Charter of Fundamental Rights...an article which must be read in conjunction with the obligation to take into consideration the child's best interests, recognised in Article 24(2) of the Charter'.⁸⁸ In this case, it was found that the

⁸⁴ Case C-256/11 *Dereci*, EU:C:2011:734, para. 68 (emphasis added); for analysis, see S Adam and P Van Elswege 'Citizenship rights and the federal balance between the European Union and its Member States: comment on *Dereci*' (2012) 37 *European Law Review* 176.

⁸⁵ *Dereci*, para. 69.

⁸⁶ *Dereci*, para. 70.

⁸⁷ *Dereci*, para. 72.

⁸⁸ Case C-304/14 *CS*, EU:C:2016:674, para. 36. At para. 31, the Court had explained that '*CS*'s child has the right, as a Union citizen, to move and reside freely within the territory of the European Union, and any limitation of that right falls within the scope of EU law'.

contested legislation ‘seems to establish a systematic and automatic link between the criminal conviction of the person concerned and the expulsion measure applicable to him or, in any event, there is a presumption that the person concerned must be expelled’.⁸⁹ In such circumstances, the child’s rights under Article 7 of the Charter are part of the ‘balancing exercise required’ of national courts, against the Member State’s public policy or public security interest in seeking deportation of the family member.⁹⁰ To assess proportionality, and referring to ECtHR case law, the Court directed that ‘[p]articular attention must be paid to [the child’s] age, his situation in the Member State concerned and *the extent to which* he is dependent on the parent’.⁹¹

What is far less clear is the role that fundamental rights should play in determining the existence of *Ruiz Zambrano* residence rights in the first place. In *Dereci*, Advocate General Mengozzi indicated that the substance of EU citizenship rights criterion articulated in *Ruiz Zambrano* does not per se ‘include the right to respect for family life’.⁹² Moreover, under the case law of the Strasbourg Court, ‘Article 8 of the ECHR does not guarantee foreign nationals “a right to choose the most suitable place to develop family life” and does not impose on a State “a general obligation to respect immigrants’ choice of the country of their matrimonial residence and to authorise family reunion in its territory”’.⁹³ In *Iida*, however, Advocate General Trstenjak argued that ‘if it were to transpire in a particular case that denying a right of residence would rule out the possibility of maintaining regular personal relations, this could constitute interference with a fundamental right, the justification for which would have to be assessed from the standpoint of proportionality’.⁹⁴ The minor Union citizen in *Iida* had exercised cross-border movement; should the same line of reasoning apply when determining whether a dependent Union citizen is being forced to leave the Union territory where one parent (or other carer⁹⁵) is denied a residence permit in the citizen’s home State?

In *O and S*, the Court repeated *Dereci* language about ‘the mere fact that it might appear desirable to a national of a Member State to keep his family together in the territory of the Union’, but it also seemed to soften that approach by construing dependency as potentially meaning ‘legally, financially or emotionally dependent’.⁹⁶ In the context of EU legislation on family reunification for third country nationals, the Court also confirmed that Article 7 of the Charter ‘must also be read in

⁸⁹ CS, para. 44.

⁹⁰ CS, para. 48 (and see also, paras 46-47).

⁹¹ CS, para. 49 (emphasis added); citing *Jeunesse v The Netherlands* (Application no. 12738/10), judgment of 3 October 2014, para. 118.

⁹² AG Mengozzi in *Dereci* (EU:C:2011:626), para. 37 of the View.

⁹³ AG Bot in Case C-83/11 *Rahman*, EU:C:2012:174, para. 72 of the Opinion, citing *Ahmut v The Netherlands* (1996) 24 EHRR 62, paras 71 and 67 and *Gül v Switzerland* (1996) 22 EHRR 93, para. 38.

⁹⁴ AG Trstenjak in *Iida*, para. 85 of the Opinion, which continued: ‘it would be necessary to consider, among other things, whether the child’s father who is a third-country national also actually exercises his right of custody and endeavours to fulfil his parental duties’.

⁹⁵ *O and S*, para. 55.

⁹⁶ *O and S*, para. 56.

conjunction with the obligation to have regard to the child's best interests, recognised in Article 24(2) of the Charter, and with account being taken of the need, expressed in Article 24(3), for a child to maintain on a regular basis a personal relationship with both parents'.⁹⁷ However, in *Ymeraga* – a judgment delivered without an Advocate General's opinion – the harder position re-emerged, in the finding that 'the refusal to confer a right of residence on [the applicant's] family members *does not have the effect* of denying him the genuine enjoyment of the substance of the rights conferred by virtue of his status as citizen of the Union. *In those circumstances*, the Luxembourg authorities' refusal to grant [his] family members a right of residence as family members of a Union citizen *is not a situation involving the implementation of European Union law within the meaning of Article 51 of the Charter*, so that its conformity with fundamental rights cannot be examined in the light of the rights established by the Charter'.⁹⁸

In other words: the determination of dependency is made first; and only if dependency is established does the situation fall within the scope of EU law. But how can it be logical or proper to separate determinations of dependency from consideration of family life, and all the more from Article 24 of the Charter when children are involved? As argued by Advocate General Wathelet in *NA*, '[i]f a Treaty provision does not preclude a Member State from refusing a right of residence subject to compliance with certain conditions, it follows by definition that the situation in question falls within the scope of that provision. If that were not the case, the Court would have to decline jurisdiction to answer the question referred'.⁹⁹ Advocate General Sharpston has agreed that 'it is necessary to look at a legal situation through the prism of the Charter if, but only if, a provision of EU law imposes a positive or negative obligation on the Member State (whether that obligation arises through the Treaties or EU secondary legislation)'.¹⁰⁰ How is the requirement to make an assessment of whether or not a *Ruiz Zambrano* residence right might exist, a requirement based on Article 20 TFEU, *not* an obligation imposed by EU law on national authorities? In the same Opinion, she continued:

[A] provision such as Article 20 or 21 TFEU is not simply a basis for residence status separate from Article 7 of the Charter. Rather, considerations regarding the exercise of the right to a family life permeate the substance of EU citizenship rights. Citizenship rights under Article 20 or 21 TFEU must thus be interpreted in a way that ensures that their substantive content is 'Charter-compliant'. That process is separate from the question of whether a justification advanced for a restriction of EU citizenship rights...is consistent with the Charter. Such an approach does not 'extend' the scope of EU law and thus violate the separation of competences between the Union and its

⁹⁷ *O and S*, para. 76; addressing Directive 2003/86 on the right to family reunification, OJ 2003 L 251/12.

⁹⁸ Case C-87/12 *Ymeraga*, EU:C:2013:291, paras 42-43.

⁹⁹ AG Wathelet in *NA*, para. 122 of the Opinion.

¹⁰⁰ AG Sharpston in Case C-456/12 *O* (EU:C:2013:837) and Case C-457/12 *S* (EU:C:2013:842), para. 61 of the Opinion.

constituent Member States. It merely respects the overarching principle that, in a Union founded on the rule of law, all the relevant law (including, naturally, relevant primary law in the shape of the Charter) is taken into account when interpreting a provision of that legal order. When viewed in that light, taking due account of the Charter is no more ‘intrusive’, or ‘disrespectful of Member State competence’, than interpreting free movement of goods correctly.¹⁰¹

In *NA*, Advocate General Wathelet expressly endorsed her argument, adding that ‘the inclusion of Article 7 of the Charter in the national court’s reflection on the application of Article 20 TFEU is not such as to have the effect of extending the scope of EU law in a manner that would be contrary to Article 51(2) of the Charter. After all, it is European citizenship as provided for in Article 20 TFEU that triggers the protection afforded by the fundamental rights...not the other way round’.¹⁰²

That analysis then leads to another crucial question: ‘must the obligation to leave the territory of the European Union be measured from a legal perspective or *in concreto*, in relation to the facts?’¹⁰³ In Advocate General Wathelet’s view, a theoretical (‘legal’) possibility of having to leave the territory of the Union has to be distinguished from the factual circumstances of an individual case.¹⁰⁴ For example, in the *NA* case, ‘although, “as German nationals”, NA’s daughters “enjoy an unconditional right of residence in Germany, it is also common ground that neither they nor [their] mother can reasonably be expected to live there, and, on this basis, the domestic courts have held that they could not be removed [from the United Kingdom to Germany] without violating the ECHR”. [I]f that information were to be confirmed by the referring court, it would fall to that court to recognise MA and IA as having a right of residence in the United Kingdom on the basis of Article 20 TFEU, with NA herself, by extension, obtaining a derived right of residence’.¹⁰⁵

The Court’s implicit guidance in *Dereci* and explicit ruling in *Ymeraga* had contrasted vividly with the *integrated* approach later promoted by Advocates General Sharpston and Wathelet. Their logic is compelling. Article 20 TFEU requires national authorities to consider a derived residence right in a Union citizen’s home State where the denial of that right might deprive the Union citizen of the genuine enjoyment of the substance of their citizenship rights. That requirement in turn imposes an obligation on national authorities, which accords with the *Åkerberg Fransson* et al understanding of implementing Union law per Article 51(1) of the Charter. The instinct to limit the reach of EU law in situations that are factually confined to one Member State is understandable. But, as already argued in section III(A) for situations involving the exercise of free movement rights, developing a fragmented approach to what does or does not fall within the scope of Union law does not provide a defensible solution to

¹⁰¹ AG Sharpston in *O and S*, paras 62-63 of the Opinion.

¹⁰² AG Wathelet in *NA*, para. 125 of the Opinion.

¹⁰³ AG Wathelet in *NA*, para. 98 of the Opinion.

¹⁰⁴ AG Wathelet in *NA*, esp. paras 105-109.

¹⁰⁵ AG Wathelet in *NA*, paras 116-117 of the Opinion.

a more general scope of Union law problem. Where the Article 20 TFEU door is opened – and the Court itself opened it – the Charter applies in consequence.

As seen, the Court tends to encourage national courts to reflect on the lawfulness of deprivation of residence rights for family members under Article 8 ECHR where it rules out the application of the Charter.¹⁰⁶ The paradoxical position that national judges may then find themselves in is that a situation acknowledged to breach Article 8 ECHR is removed from the ambit of Article 7 of the Charter even though the national judge is partly ascertaining the existence of rights under Article 20 TFEU – a reflection itself required by the *Ruiz Zambrano* case law. A brief look at national case law helps to demonstrate the logic of a more integrated framework. For example, consider the reasoning in a Court of Appeal judgment (England and Wales), interpreting national rules implementing *Ruiz Zambrano*:

[T]he welfare of the child cannot be the paramount consideration because that would be flatly inconsistent with the statutory test which is whether the child would be unable to reside in the UK if the mother left. It will, in normal circumstances, be contrary to the interests of a child for one of its parent carers, whether the primary carer or not, to be taken away from him or her. *It would certainly be contrary to article 24(3) of the Charter...* The only basis upon which the reviewer was considering the adequacy of the father's ability to care for [the child] was because *it was obvious that it would be a bad thing for him to have to leave his mother*, and the reviewer needed to establish whether the effect would be so bad that Brandon would be unable to remain in the UK. At one end of the spectrum, there would be a situation in which the father would refuse or be unable to care for Brandon at all – in that case he would obviously be compelled to leave to follow his mother. At the other end of the spectrum, the father would offer a very satisfactory home for Brandon which would not seriously impair his quality or standard of life, in which case he would be well able to stay in the UK. [It] was not surprising that the reviewer did not spend much time explaining how bad it would be for a 4-year old child to be separated from his mother. That was a given.¹⁰⁷

And citing *Dereci*, it was starkly observed that ‘only a limited importance is given to the right to respect for family life’.¹⁰⁸ Similarly, in *Harrison*, the national judge concluded that ‘the right to reside in the territory of the Union is not a right to any particular quality of life or to any particular standard of living. Accordingly, there is no impediment to exercising the right to reside if residence remains possible as a matter of substance, albeit that the quality of life is diminished’.¹⁰⁹ Reflecting on the

¹⁰⁶ E.g. *Dereci*, paras 72-73.

¹⁰⁷ Vos LJ in *Hines v Lambeth LBC*, Court of Appeal (Civil Division) [2014] EWCA Civ 660, paras 22 and 27 (emphasis added).

¹⁰⁸ *Ibid* para. 22.

¹⁰⁹ Elias LJ in *Harrison v Secretary of State for the Home Department*, Court of Appeal (Civil Division) [2012] EWCA Civ 1736, para. 67.

Dereci exclusion of ‘economic reasons or in order to keep his family together in the territory of the Union’, the *Harrison* judgment then presents the resulting dilemma:

In practice these are the most likely reasons why the right of residence would be rendered less beneficial or enjoyable. If these considerations do not engage this wider principle, it seems to me extremely difficult to identify precisely what will. What level of interference with the right would fall short of de facto compulsion and yet would constitute a form of interference which was more than simply the breakdown of family life or the fact that the EU citizens are financially disadvantaged by the removal of the non EU national family member?¹¹⁰

It is difficult to recognise how we normally conceive the fundamentals of the EU legal order in these statements. Yet they are apparently consistent with the guidance issued to national courts by the Court of Justice.¹¹¹

Disconnecting the determination of dependency from fundamental rights analysis might also lead to outcomes inconsistent with ECHR. For example, in *Jeunesse v The Netherlands*, the ECtHR reflected on a family situation involving a Surinamese mother and Dutch father as follows:

Noting that the applicant takes care of the children on a daily basis, it is obvious that their interests are best served by not disrupting their present circumstances by a forced relocation of their mother from the Netherlands to Suriname or by a rupturing of their relationship with her as a result of future separation. In this connection, the Court observes that the applicant’s husband provides for the family by working full-time in a job that includes shift work. He is, consequently, absent from the home on some evenings. The applicant – being the mother and homemaker – is the primary and constant carer of the children who are deeply rooted in the Netherlands of which country – like their father – they are nationals. The materials in the case file do not disclose a direct link between the applicant’s children and Suriname, a country where they have never been.¹¹²

¹¹⁰ Ibid para. 68.

¹¹¹ See further e.g. the report on the Netherlands (prepared by J Langer and A Schrauwen) for the XXVI FIDE Congress (Copenhagen, 2014) in U Neergaard, C Jacqueson and N Holst-Christensen (eds) *Union Citizenship: Development, Impact and Challenges*, available at <http://fide2014.eu/pdf/FINAL-Topic-2-on-Union-Citizenship.pdf>, 695 at 705-708.

¹¹² *Jeunesse v The Netherlands*, para. 119. Interestingly, in *NA*, the Secretary of State did not appeal a finding at first instance that refusing a right to reside to the applicant would, since it would compel the children to leave the *United Kingdom*, breach the children’s ECHR rights. AG Wathelet indicated in his Opinion that a right to reside under EU law should still be considered, since ‘it is not inconceivable that the Court’s answers to the various questions put to it will determine whether NA is eligible for certain social security benefits and special non-contributory benefits which she is currently denied because of the restriction of the rights conferred by a right of residence based on Article 8 ECHR’ (para. 30 of the Opinion).

But following *Dereci*, and thus without applying the Charter, it would be difficult to demonstrate forced departure from the Union noting the father's Dutch nationality.

It is therefore both significant and welcome to discern glimmers of the integrated approach in the Court of Justice's recent judgment in *Rendón Marín*. The applicant is a Colombian national and the sole carer of two children. His son is a Spanish national and his daughter is a Polish national, but both children have always lived in Spain. The children's mother is a Polish national but it was not known where she resided at the time of the case. The applicant has a criminal record in Spain, which resulted in his 2010 application for a temporary residence permit being rejected.¹¹³ The Court assessed the applicant's claim to derived residence rights under two different strands of EU law. It was first considered whether he had a right to reside in Spain on the basis of Directive 2004/38, as the father of a Polish daughter. On this question, the Court applied standard free movement analysis: the Union citizen's residence rights must first be established on the basis of the conditions set down in Article 7(1)(b) of the Directive; if those conditions are met, the situation falls within the scope of Union law; consequently, when determining 'the possible expulsion of Mr Rendón Marín [in accordance with Article 27 of the Directive], it is necessary, first, to take account of the fundamental rights whose observance the Court ensures, in particular the right to respect for private and family life, as laid down in Article 7 of the Charter of Fundamental Rights of the European Union'.¹¹⁴

Should the conditions of Article 7(1)(b) not be met, the Court also considered whether a residence right might be derived from Mr Rendón Marín's Spanish son under Article 20 TFEU and *Ruiz Zambrano*. Here, we are reminded of Advocate General Wathelet's distinction between a possibility to reside in another State in law and that possibility in reality. Cases such as *Dereci* and *Ymeraga*, and also *Alokpa and Moudoulou*,¹¹⁵ suggested that possibility in law was enough to defeat a *Ruiz Zambrano* claim. However, in *Rendón Marín*, the Court is strikingly more nuanced:

Several Member States which have submitted observations have contended that Mr Rendón Marín and his children could move to Poland, the Member State of which his daughter is a national. Mr Rendón Marín, for his part, stated at the hearing that he maintains no ties with the family of his daughter's mother, who, according to him, does not reside in Poland, and that neither he nor his children know the Polish language. In this regard, it is

¹¹³ Case C-165/14 *Rendón Marín*, EU:C:2016:675, para. 16. In the same paragraph, it was also observed that '[o]n the date of the order for reference...he was awaiting a decision on an application for mention of his criminal record to be removed from the register'.

¹¹⁴ *Rendón Marín*, para. 66.

¹¹⁵ Case C-86/12 *Alokpa and Moudoulou*, EU:C:2013:645; here, the fact of the French nationality of a Togolese national's children was deemed to preclude a *Ruiz Zambrano*-based right to reside in Luxembourg, notwithstanding the applicant's submission that 'she was unable to settle with her children in France, or reside with their father on the ground that she had no relations with the latter and that those children required follow-up medical treatment in Luxembourg as a result of their premature birth' (para. 15).

for the referring court to check whether, in the light of all the circumstances of the main proceedings, Mr Rendón Marín, as the parent who is the sole carer of his children, may in fact enjoy the derived right to go with them to Poland and reside with them there, so that a refusal of the Spanish authorities to grant him a right of residence would not result in his children being obliged to leave the territory of the European Union as a whole.¹¹⁶

Without prejudice to the final say being left to the national court, the Court continued: 'it seems to be clear from the information before the Court that the situation at issue in the main proceedings is capable of resulting, for Mr Rendón Marín's children, in their being deprived of the genuine enjoyment of the substance of the rights which the status of Union citizen confers upon them, and that it therefore falls within the scope of EU law'.¹¹⁷ The Court was then free to follow the logic of its judgment in *CS*, delivered on the same day:

Article 20 TFEU does not affect the possibility of Member States relying on an exception linked, in particular, to upholding the requirements of public policy and safeguarding public security. However, in so far as Mr Rendón Marín's situation falls within the scope of EU law, assessment of his situation must take account of the right to respect for private and family life, as laid down in Article 7 of the Charter, an article which...must be read in conjunction with the obligation to take into consideration the child's best interests, recognised in Article 24(2) of the Charter.¹¹⁸

If the approach tested in this judgment continues to take root, displacing *Dereci* and *Ymeraga* in future *Ruiz Zambrano* situations, it would show that appropriate integration of citizenship rights and fundamental rights *is* feasible.¹¹⁹

IV. Citizenship and Article 52: reconciling the Charter and the Treaty

We saw in section II(B) that derogating from free movement rights constitutes implementing Union law for the purposes of Article 51 of the Charter and that

¹¹⁶ *Rendón Marín*, para. 78. For similar tendencies in UK case law, see e.g. *R. (on the application of Zewdu) v Secretary of State for the Home Department* [2015] EWHC 2148 (Admin), para. 27 ('as to the suggestion that there might be some other carer in the [UK] who could take charge of the boy, this is mere speculation'); *Secretary of State for the Home Department v AQ (Nigeria)* [2015] EWCA Civ 250, para. 77 ('I cannot accept the Secretary of State's position that the tribunal was only required to consider the ability of others to care for the child in the UK and was bound to ignore questions such as whether a family member would be willing to provide care or was under any familial or other responsibility to do so...In the present case...it seems that none of the witnesses were asked whether she would care for AQ's son if the only alternative was that he would be required to leave the UK with his mother').

¹¹⁷ *Rendón Marín*, para. 80.

¹¹⁸ *Rendón Marín*, para. 81.

¹¹⁹ Note e.g. the Opinion of AG Szpunar (EU:C:2016:659) in Case C-133/15 *Chavez-Vilchez and Others* (judgment pending at the time of writing).

Article 52(1) establishes how Charter rights may be limited. Additionally, Article 52(3) requires that where Charter rights correspond to ECHR rights, ‘the meaning and scope of those rights shall be the same as those laid down by the said Convention’. The fact that recent citizenship case law has retracted the parameters within which an assessment of the *impact* of limitations in individual cases must be undertaken is considered in several contributions to this volume.¹²⁰ Previously, however, Advocate General Geelhoed had linked that obligation to the Charter:

[I]t should also be possible to apply [national criteria and conditions] with sufficient flexibility to take account of the particular individual circumstances of applicants, where refusal of [social] assistance is likely to affect what is known in German constitutional law as the ‘Kernbereich’ or the substantive core of a fundamental right granted by the Treaty, such as the rights contained in Article [21(1) TFEU]...[T]his principle has been laid down in Article [52(1)] of the Charter of Fundamental Rights of the Union...This provides that any limitation on the exercise of the rights and freedoms recognised by the Charter must respect the essence of these rights and freedoms. Article [45(1)] of the Charter guarantees the freedom of EU citizens to move and reside within the territory of the Member States in terms which are essentially identical to Article [21(1) TFEU].¹²¹

However, as also seen in section II, Article 52(2) provides that ‘[r]ights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties’ – drawing a line back to Articles 20(2) and 21(1) TFEU, which explicitly authorise the limitation of rights by legislation. But how do all of these instructions relate to each other?

Before the Charter had binding legal effect, the language of fundamental rights already characterised how limits on free movement should be evaluated. For example, in *Trojani*, Advocate General Geelhoed was clear that ‘the right of residence is a fundamental right of every European citizen, and it should be possible actually to exercise this fundamental right’ while acknowledging that ‘[a]t the same time, the right of residence may be limited or subjected to conditions only on the grounds of compelling national interest’.¹²² In *Baumbast*, the Court emphasised that ‘the application of the limitations and conditions acknowledged in Article [21(1) TFEU] in respect of the exercise of that right of residence is subject to judicial review’.¹²³ The implications of citizenship as a status bearing rights was also recognised through the idea that ‘a particularly restrictive interpretation of the derogations from [freedom of movement] is required by virtue of a person’s status as a citizen of the Union’.¹²⁴

¹²⁰ See esp. the contributions in this volume by F Wollenschläger and P Minderhoud.

¹²¹ AG Geelhoed in Case C-209/03 *Bidar* (EU:C:2004:715), para. 32 of the Opinion. Describing the ‘primary and individual right to move and reside freely’ as being ‘reaffirmed’ by Article 45 of the Charter, see e.g. Case C-162/09 *Lassal*, EU:C:2010:592, para. 29.

¹²² AG Geelhoed in Case C-456/02 *Trojani* (EU:C:2004:112), paras 12-13 of the Opinion.

¹²³ *Baumbast*, para. 86.

¹²⁴ E.g. Joined Cases C-482-/01 and C-493/01 *Orfanopoulos and Oliveri*, EU:C:2004:262, para 65.

As flagged in section III(A), the strained translation of that logic to the binding Charter environment, coinciding with diminished appetite for progressing citizenship rights, is well illustrated by Advocate General Wathelet's reasoning in *Dano*. He first referred to 'the principle of equal treatment...in Article 20 of the Charter [as] also laid down in Articles 20 TFEU and 21 TFEU' and acknowledged that 'Regulation No 883/2004 and Directive 2004/38 flesh out the meaning and scope of the principle of equality established by those provisions'.¹²⁵ Then he continued:

Under Article 52(2) of the Charter, rights recognised by the Charter for which provision is made in the Treaties are to be exercised under the conditions and within the limits defined by those Treaties. As the [relevant questions referred] concern provisions of secondary law defining the conditions and limits of the rights protected by Articles 20 TFEU and 21 TFEU, it seems to me to be sufficient to examine those questions for the purpose of providing the referring court with a useful answer.¹²⁶

We have also seen legislative limits applied 'by analogy' even when the case falls outside the scope of the Directive but within the scope of primary Treaty rights.¹²⁷

The newer approach depletes the practice of testing the provisions of secondary legislation for compliance with fundamental rights. The case law has moved towards a starting point that the provisions of secondary legislation are legitimate on the basis that Articles 20 and 21 TFEU infer that they must be. The reach of judicial review is then significantly reduced. In *Alokpa*, Advocate General Mengozzi considered 'the possibility that the provisions of the Charter...might result in [the] conditions [in Article 7(1)(b) of Directive 2004/38 being relaxed or even disregarded, in particular with a view to ensuring that account is taken of the child's best interests (Article 24 of the Charter) and respect for family life (Articles 7 and 33 of the Charter)'.¹²⁸ Even the language here – 'relaxed or even disregarded' – is interesting. It already conveys that something would be awry with such an investigation. But surely being 'subject to judicial review' is just a more neutral expression of the same inquiry? It is not, in other words, a question of the requirement to have sufficient resources being 'relaxed' by consideration of Charter rights; such conditions are just being examined for compliance with Charter i.e. primary law rights.

Advocate General Mengozzi concluded in *Alokpa* that 'it appears difficult to envisage such a possibility, since this would mean disregarding the limits laid down by Article 21 TFEU on the right of citizens of the Union to move and reside freely...and would therefore...result in the modification of the powers and tasks defined in the

¹²⁵ AG Wathelet in *Dano*, para. 149 of the Opinion.

¹²⁶ AG Wathelet in *Dano*, paras 150-151 of the Opinion.

¹²⁷ E.g. Case C-456/12 *O*, EU:C:2014:135, para. 50; criticising this approach, see AG Szpunar in Case C-202/13 *McCarthy* (EU:C:2014:345), para. 82 of the Opinion.

¹²⁸ AG Mengozzi in *Alokpa* (EU:C:2013:197), para. 34 of the Opinion.

Treaties, in breach of Article 51(2) of the Charter'.¹²⁹ Even though Article 6(1) TEU confers equal status on the Treaties and the Charter, the Charter's final provisions seem to create an exception: for rights conferred on EU citizens, the Treaties have a superior status; which means, in actual fact, that legislation has a superior status.¹³⁰ It is not self-evident, though, why merely *enabling* restriction of rights by legislation, as Articles 20 and 21 TFEU do, should also provide enhanced shelter from judicial review for the legislative choices made. Nevertheless, the capacity of legislation to set limits on citizenship rights but also on fundamental rights was well demonstrated in the February 2016 Decision negotiated in the context of the UK's referendum on withdrawal from the European Union. A Declaration attached to the Decision on 'issues related to the abuse of the right of free movement of persons' outlined various questions that the Commission intended to re-examine. In particular: '[t]he Commission intends to adopt a proposal to complement Directive 2004/38...in order to exclude, from the scope of free movement rights, third country nationals who had no prior lawful residence in a Member State before marrying a Union citizen or who marry a Union citizen only after the Union citizen has established residence in the host Member State. Accordingly, in such cases, the host Member State's immigration law will apply to the third country national'.¹³¹

That proposal was interesting because, if adopted, it would reverse the Court's decision in *Metock*. In that judgment, two levels of analysis can be identified. First, the Court reasoned that since the EU legislator did not include a condition on prior lawful residence for such family members in Directive 2004/38, no such requirement could then be read into the measure. On that basis, it is plainly conceivable that an amendment of the Directive is all that would be needed to change things. But second, the right to respect for family life infuses the judgment throughout.¹³² What recent

¹²⁹ AG Mengozzi in *Alokpa*, para. 35 of the Opinion; for the avoidance of doubt, he also pointed out: '[b]y way of a reminder...Article 21(1) TFEU provides that that right exists "subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect" and, therefore, to those laid down in Directive 2004/38' (footnote 15 of the Opinion).

¹³⁰ This position can be contrasted further with arguments about an even 'higher rank' for the Charter vis-à-vis the Treaties notwithstanding the wording of Article 6(1) TEU; on this point, see J Kokott and C Sobotta, 'The Charter of Fundamental Rights of the European Union after Lisbon' EUI Working Papers, AEL 2010/6, available at http://cadmus.eui.eu/bitstream/handle/1814/15208/AEL_WP_2010_06.pdf?sequence=3, 6. Adding a caution around extending autonomous status to Article 18 TFEU for the purposes of Charter trigger, see D Thym 'Separation versus fusion – or: how to accommodate national autonomy and the Charter? Diverging visions of the German Constitutional Court and the European Court of Justice' (2013) 9 *European Constitutional Law Review* 391, 414-418.

¹³¹ Annex VII to the Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union, 18-19 February 2016.

¹³² See *Metock*, para. 56 ('Even before the adoption of Directive 2004/38, the Community legislature recognised the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms'); para. 62 ('if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed by the Treaty would be

case law seems to suggest is that this wider environmental dimension can be legislated away too, suggesting once again that the binding effect of the Charter can make it easier in some respects, and even if counter intuitively, to accomplish reduced protection of rights. That is not, for the integrity of either citizenship rights or fundamental rights, a constitutionally safe place to be.

V. Conclusion

This chapter examined how the Charter of Fundamental Rights has been applied in citizenship case law since the Lisbon Treaty acquired binding legal effect. Three main conclusions can be summarised. First, the relationship between free movement rights and fundamental rights has become more complicated. Citizenship law is already complex on its own terms. Similarly, how the provisions of the Charter fit together internally, never mind with the provisions of the Treaties, has become less and not more clear. Second, it is difficult to assess how Charter rights might affect free movement rights in substance, since Article 51 of the Charter has been applied with notable strictness in citizenship case law – at odds with how it is construed in case law more generally. In fact, citizenship cases that most transmit what we might describe as Charter ethos tend not to mention the instrument at all. Third, the largely unchecked force of legislation arguably exceeds what Articles 20 and 21 TFEU, read in conjunction with Article 52 of the Charter, would compel. In this respect, there is more reluctance to undertake substantive judicial review when limitations on free movement rights are challenged; conversely, the baseline (Directive) conditions of free movement might be glossed over when a Charter solution is preferred.

Three discussion points can be highlighted in consequence. First, the analysis presented here confirms a theme evident in several contributions to this volume: that citizenship law seems now to be more about the State than the citizen.

Second, the chapter advocates an integrated understanding of citizenship rights and fundamental rights – pursued initially by Advocates General trying to inject Charter considerations into the *Ruiz Zambrano* case law, but seen recently to have had some influence on the reasoning of the Court too. Ironically, though, the Charter seems less visible in more conventional i.e. free movement-based citizenship case law. It was emphasised that the Charter is not a standalone fundamental rights instrument and that its application might not change certain substantive case outcomes at all. But engaging with its guarantees more consistently is as much about ‘elevat[ing] the constitutional tone of the reasoning’.¹³³ Furthermore, it is simply a fact that national judges and national authorities are asking Charter questions; and they need

seriously obstructed’); and para. 89 (‘Where a Union citizen founds a family after becoming established in the host Member State, the refusal of that Member State to authorise his family members who are nationals of non-member countries to join him there would be such as to discourage him from continuing to reside there and encourage him to leave in order to be able to lead a family life in another Member State or in a non-member country’).

¹³³ Iglesias Sánchez, n78 above, 1579.

guidance to manage their decision-making effectively and appropriately. We tend to pitch EU and national fundamental rights standards against each other. But we can also conceive ‘a variety of autonomous legal orders coexisting in a common space and with *common* objectives’.¹³⁴ In that light, if national courts are more frequently locating citizenship questions within the system of the Charter, they may need clearer answers not because national or indeed ECHR law does not provide any protection; but just to check whether the Charter might provide *different* protection.

Third, questions about how to balance judicial and legislative contributions to the realisation of citizenship rights have inevitably intensified through consideration of the Charter. This is another longstanding story in citizenship law. But it has broader implications for the Union’s system of judicial review and for what it means to ‘found’ that system on respect for fundamental rights and on the rule of law. Neither the initial phase of citizenship-charged case law nor the more recent phase of State-charged case law pleases everyone. However, the incline of the corrective balance, in either direction, as well as the methods developed to realise it offer useful standards for the assessment of constitutional quality that could be shared more widely. In that light, what we may take for granted as foundational premises of the EU legal order could be more vulnerable than we might realise. A key strand of understanding the relationship between the Union and the role of law in its shaping was articulated as the idea of integration through law. We should be careful not to bring about the disintegration *of* that law. Neither Treaty nor Charter guarantees should be evaded on account of the sheer power that their integration might produce. If primary law is part of that problem,¹³⁵ then primary law is what needs to be changed.

¹³⁴ Sarmiento, n50 above, 1302 (emphasis added).

¹³⁵ See e.g. J Snell, Fundamental rights review of national measures: nothing new under the Charter?’ (2015) 21 *European Public Law* 285, 308 (‘if the Masters of the Treaties do wish to alter the law, they need to do so in the clearest of terms, which was not the case for Article 51(1)’).